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Issue date: 24Jun2002

CASE NUMBER: 2002-CAA-15

IN THE MATTER OF

DANTE JACKSON,
Complainant

v.

NORTHROP GRUMMAN CORP.,
Respondents

ORDER GRANTING AND DENYING IN PART RESPONDENT'S MOTION FOR A PROTECTIVE ORDER AND COMPLAINANT'S MOTION TO COMPEL

On May 22, 2002, Complainant served a Motion to Compel the deposition testimony of Kip Keenan and to compel the production of documents pursuant to Complainant's First Interrogatories and Request for Production No. 34. On May 30, 2002, Respondent filed a Response to Complainant's Motion to Compel and a Cross Motion for a Protective Order. Hearing in this matter is set for July 8-9, 2002.

On July 6, 2001, Respondent laid off Complainant from its facility in Huntsville, Alabama. Complainant alleges that his termination was in retaliation for complaining (whistleblowing) about the shipment of waste from Respondent's facility. During discovery, Complainant deposed Respondent's 30(b)(6) representative seeking information about a health and safety audit detailing the disposal of hazardous materials, about production at Respondent's facility, and the waste that production generated. Respondent refused to allow discovery on the grounds that the parties had not entered into a confidentiality agreement. Complainant also seeks discovery of events occurring after Complainant's termination, which Respondent objected to on grounds of relevancy, and Complainant seeks to compel documents showing how much costs Respondent saved by terminating Complainant, which Responded objected to on the grounds that Complainant never asked for that information in his original discovery requests.

1. Protective Order

The granting of a protective order under the rules of practice and procedure used by this office provide that a protective order may be issued:

> Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires

> to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .

29 C.F.R. § 18.15 (2001). *See also* Fed. R. Civ. P. 26(c) (2002).

In the Eleventh Circuit, courts require a showing of "good cause" made by the party seeking protection. *Chicago Tribune Co v. Bridgestone/Firestone, Inc*., 263 F.3d 1304, 1313 (11 Cir. 2001). A balancing test is used to weigh a party's interest in obtaining access against the other party's interest in maintaining the information as confidential. *Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985). Showing "good cause" for a protective order is established "when it is specifically demonstrated that disclosure will cause clearly defined and serious injury; broad allegations of harm, unsubstantiated by specific examples, will not suffice." *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483-84 (3rd Cir. 1995). Broad discretion is afforded trial courts to evaluate the competing interests because the trial court is in the best position to prevent the use of overly broad confidentiality orders and to deny confidentially to material that should be opened to scrutiny. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 492 (1991)). In weighing whether good cause exists to issue a protective order, and in balancing the interests of the parties, several factors are illuminating:

> 1) whether disclosure will violate any privacy interests;
> 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
> 3) whether disclosure of the information will cause a party embarrassment;
> 4) whether confidentiality is being sought over information important to public health and safety;
> 5) whether the sharing of information among litigants will promote fairness and efficiency;
> 6) whether a party benefitting from the order of confidentiality is a public entity or official; and
> 7) whether the case involves issues important to the public.

Pansey v. Borough of Stroudsburg, 23 F.3d 772, 786 (3rd Cir. 1994).

A. Deposition of Respondent's 30(b)(6) Representative, Kip Keenan - Rates of Production and Materials Used

Complainant noticed the deposition of Respondent's 30(b)(6) representative to testify concerning the following subjects:

> 4. The actual work done on the BAT and Longbow Hellfire Missile projects on Redstone Arsenal in Huntsville, including the level and rate of production from the start of operations of the Arsenal to the present, the materials used in production , and the waste generated in production.

(Compl. Mot. Compel at 2).

At Mr. Keenan's deposition, counsel for Respondent specifically instructed Mr. Kennan not to answer questions regarding topic 4 until the parties entered into a stipulation of confidentiality. Complainant argues that waste generated in production is relevant to the key issue in this case of whether the waste Respondent produced was hazardous. Complainant argues that Respondent did not meet is burden to sustain it objection of confidentiality. Respondent asserts that is will allow Kip Keenan to testify regarding production, once the parties enter into a stipulation of confidentiality.

Material containing information concerning national defense or military secrets is protected by the states secrets privilege. 5 U.S.C. § 552(b)(1) (2002) (exempting material from FOIA requests that are kept secret in the interest of national defense); *In re Agent Orange Product Liability Litigation*, 97 F.R.D. 427, 430-31 (D.C. NY 1983)(citing Wright and Miller, FEDERAL PRACTICE AND PROCEDURE: Civil §§ 2019 (1970))(state secret privilege); *Weiss*, 155 Ct. Cl. 825, 1961 WL 1568, *25 (1961)(stating that "[p]erhaps there is an area of military and diplomatic secrets where the national interest must prevail even at the expense of private justice.").

Complainant has a legitimate reason for seeking information concerning the rate of production and material used as it is relevant to what kinds of waste is produced by Respondent and substantiates his "good faith" belief that Respondent was violating environmental laws. The information, however, is not critical to Complainant's case. I also recognize that method and rates of production at the facility, which concerns military missile projects, impinges on the interests of national security. Furthermore, Respondent is not denying discovery of the information and it is not denying Complainant access to justice. Accordingly, in the interest of our national defense, I GRANT Respondent's Motion for a Protective Order in part so that information regarding the materials used in production and the method of production must be kept confidential between the parties.

B. Deposition of Respondent's 30(b)(6) Representative, Kip Keenan - Waste Generated, Handling and Storage of Hazardous Materials and the Health and Safety Audit

Complainant noticed the deposition of Respondent's 30(b)(6) representative to testify concerning the following subjects:

> 4. The actual work done on the BAT and Longbow Hellfire Missile projects on Redstone Arsenal in Huntsville, including . . . the waste generated in production.
>
> 5. The handling, storage, transport or disposal of hazardous waste and/or toxic substances in Madison County, Alabama, by Northrop Grumman.
>
> 6. Past and present inspections, findings and actions taken by state and federal environmental agencies with respect to Northrop Grumman.

(Compl. Mot. Compel at 2).

At Complainant's 30(b)(6) deposition of Mr. Keenan, Respondent instructed Mr. Kennan not to testify about a health and safety audit done by Mr. Keenan's department in June 2000 that referenced the disposal of hazardous waste on the grounds of confidentiality. Complainant argues that Respondent did not meet is burden to sustain such an objection, especially considering the importance of the safety audit in relation to Complaint's case. Respondent asserts that it will allow Kip Keenan to testify regarding the health and safety audit, once the parties enter into a stipulation of confidentiality.

Respondent directs the Court's attention to *Reichold Chemicals v. Textron, Inc.*, 157 F.R.D. 552 (N.D. Fla. 1994), for the proposition that an internal environmental health and safety audit should be protected as confidential. *Reichold* concerned the application of the self-critical analysis privilege that "protects an organization or individual from the Hobson's choice of aggressively investigating accidents or possible regulatory violations . . . thereby creating a self-incriminating record that may be evidence of liability." *Id*. at 524. The privilege is based on Fed. R. Evid. 407, is not uniformly applied by the courts, and is a qualified privilege that may be overcome by a showing of special need. *Id*. at 524-26. Nevertheless, the court in *Reichold*, applied the privilege to exempt from discovery a health and safety report. *Id*. at 527.

This case does not involve the self-critical analysis privilege. This case involves the issue of whether "good cause" exists to issue a protective order requiring confidentiality. As such *Reichold* is inapplicable because it involves the issue of whether the health and safety report is discoverable - not whether such material should be kept confidential. Additionally, unlike *Reichold*. the health and safety audit in the instant case is central to the litigation. In balancing the interests of the parties, I note that the report is being sought for a legitimate purpose, the information will not likely cause any party embarrassment, and the information is important to public health and safety as it involves the disposable of potentially hazardous waste. Additionally, sharing the information promotes fairness and efficiency as it is central to Complainant's whistleblowing activity. Furthermore, the public has an interest in understanding what materials, if any, are being dumped into the environment and whether hazardous materials are being disposed of improperly. Accordingly, I GRANT Complainant's Motion to Compel the deposition testimony of Kip Keenan regarding items 4, 5, and 6, inasmuch as they relate to the handling and storage of hazardous material, related inspections, and type of waste generated at Respondent's facility. Respondent's Motion for a Protective Order on these matters is DENIED.

2. Relevancy of Events Occurring After Complainant's Termination

Complainant argues that Mr. Keenan was wrongfully instructed not to answer, on the grounds of relevancy, questions after Complainant was terminated in July 2001. Respondent's contend that

events that took place after Complainant's termination are simply not relevant to Respondent's motivations in terminating Complainant's employment.

Under 29 C.F.R. § 18.14 (2001), "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding." To prevail in an unlawful discrimination case, "a complainant must establish by a preponderance of the evidence that the respondent took adverse employment action against the complainant because of protected activity." *Overall v. TVA*, 1997 - ERA - 53 (ARB. April 30, 2001)(citing *Carrol v. United States Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996); *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566(8th Cir. 1980)). Such a discrimination complaint may be grounded on indirect or circumstantial evidence. *Overall*, *supra*; *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)(finding that the rules of discovery are construed broadly and encompass matters related to any issue that is, or may be, in the case). When the discovery request appears relevant, "the burden is on the objecting party to show that the discovery is not relevant." *Smith v. MCI Telecommunications Corp.*, 137 F.R.D. 25, 27 (D. Kan. 1991).

Complainant alleges that Respondent was not disposing of hazardous waste properly. Respondent asserted that certain materials Complainant complained about were not hazardous. Accordingly a waste analysis, even if taken after Complainant's temporal termination, is relevant to a key issue in the case. Thus, I find it appropriate to GRANT Complainant's Motion to Compel discovery of events that occurred after Complainant's termination that have bearing the waste produced at the time of Complainant's termination.

3. Document Request No. 34

Complainant moves to compel the production of documents in response to Request for Production No.34, which requests:

> All documents related to any and all employees, job, contractors, or other individuals or entities who have performed and who is currently performing each and every one of the complainant's former job duties held at the time of his termination (e.g. air sampling).

(Compl. Mot. Compel at 5).

Complainant contends that this request is necessary to prove that Respondent's asserted defense that Complainant was fired as a cost-cutting measure is a mere pre-text. Respondent asserts that it has complied with Request of Production No. 34 by identifying Sherry Cameron as the person performing Claimant's former job duties, and asserts that Complainant's Motion to Compel seeks information never asked for in the original request - i.e., Complainant never requested information regarding the amount of costs Respondent saved by terminating Complainant's position.

Without getting into a discussion of whether "all documents" includes the amount Respondent

is paying after Complainant's termination for performance of Complainant's former duties, I note that the issue of how much money Respondent saved by termination Complainant's employment is highly probative going to the heart of Complainant's case of discriminatory termination. The importance of this information overrides any failure by Complainant's counsel's to specifically request this information before the end of discovery. Accordingly, I GRANT Complainant's Motion to Compel the production of documents showing how much money Respondent saved, it any, in terminating Complainant's employment and reassigning his former job duties.

It is hereby **ORDERED** that:

1. Respondent's Motion for a Protective Order requesting that information be kept confidential on the methods, material, and rates of production in the BAT and Longbow Hellfire Missile projects at Redstone Arsenal in Huntsville, Alabama is **GRANTED**.

2. Respondent's Motion for a Protective Order requesting that information be kept confidential on all other aspects of this litigation, including the waste generated, handling and storage, and the health and safety audit of June 2000 is **DENIED**.

3. Complainant's Motion to Compel the deposition testimony of Respondent's 30(b)(6) representative, Kip Keenan on methods, material, and rates of production in the BAT and Longbow Hellfire Missile projects at Redstone Arsenal in Huntsville, Alabama as well as the waste generated, handling and storage, and the health and safety audit of June 2000 is **GRANTED** subject to the above stated protective order requiring confidentiality.

4. Complainant's Motion to Compel the discovery of events that occurred after July 2001 is **GRANTED**.

5. Complainant's Motion to Compel the production of documents showing how much money Respondent saved, it any, in terminating Complainant's employment and reassigning his former job duties is **GRANTED**.

A

CLEMENT J. KENNINGTON
Administrative Law Judge